

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

ASH GROVE CEMENT COMPANY,

Plaintiff,

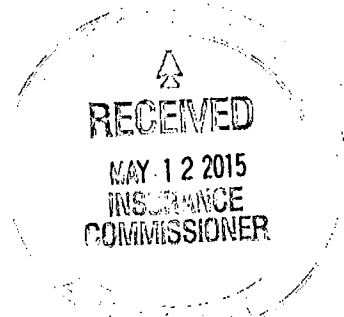
v.

ACE PROPERTY AND CASUALTY  
INSURANCE COMPANY, as successor to  
CENTRAL NATIONAL INSURANCE  
COMPANY OF OMAHA; AMERICAN  
HOME ASSURANCE COMPANY;  
AMERICAN INSURANCE COMPANY;  
FEDERAL INSURANCE COMPANY;  
LEXINGTON INSURANCE COMPANY;  
LIBERTY MUTUAL INSURANCE  
COMPANY; OAKWOOD INSURANCE  
COMPANY, as successor to CENTRAL  
NATIONAL INSURANCE COMPANY OF  
OMAHA; ONEBEACON INSURANCE  
COMPANY, as successor to HOUSTON  
GENERAL INSURANCE COMPANY; TIG  
INSURANCE COMPANY, as successor to  
INTERNATIONAL INSURANCE  
COMPANY; TWIN CITY FIRE INSURANCE  
COMPANY; UNITED STATES FIDELITY &  
GUARANTY COMPANY; UNITED STATES  
FIRE INSURANCE COMPANY;  
WESTCHESTER FIRE INSURANCE  
COMPANY, as successor to  
INTERNATIONAL INSURANCE  
COMPANY; WESTPORT INSURANCE  
CORPORATION, as successor to  
EMPLOYERS REINSURANCE COMPANY,

Defendants.

NO. 15-2-11336-4 SEA

**COMPLAINT FOR DECLARATORY  
JUDGMENT**



1 In and for its Complaint, plaintiff Ash Grove Cement Company (“Ash Grove”) hereby  
 2 asserts, complains, and alleges as follows:

3 **I. NATURE OF THE ACTION**

4 1.1 This is a civil action for declaratory judgment. Ash Grove brings this action against  
 5 the defendant primary, excess, and umbrella insurance companies identified herein (collectively,  
 6 the “Insurers”) concerning insurance coverage for Ash Grove for defense and indemnity costs for  
 7 property and other damages and losses (including, but not limited to, remedial investigations,  
 8 feasibility studies, remedial designs and actions, natural resource assessments, injuries, and  
 9 damages, and environmental liabilities under the Comprehensive Environmental Response,  
 10 Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9601, *et seq.*, and Washington’s Model  
 11 Toxics Control Act (“MTCA”), chapter 70.105D RCW), arising from the alleged contamination of  
 12 the Lower Duwamish Waterway Superfund Site (the “Site”) in Seattle, Washington. Ash Grove  
 13 seeks a declaration of Ash Grove and its Insurers’ respective rights, duties, and obligations under  
 14 the Insurers’ respective insurance policies in connection with Ash Grove’s potential liabilities at the  
 15 Site.

16 **II. PARTIES**

17 2.1 Plaintiff Ash Grove is a Delaware corporation licensed and authorized to do business  
 18 in the state of Washington. Ash Grove owns and operates a cement manufacturing and processing  
 19 plant and associated terminal and is the former lessee of a cement import terminal in Seattle,  
 20 Washington.

21 2.2 On information and belief, defendant Ace Property and Casualty Insurance  
 22 Company (“ACE P&C”) is a Pennsylvania insurance company and a successor in interest to Central  
 23 National Insurance Company of Omaha, a former Nebraska insurance company, that, at all times  
 24 relevant to this action, did transact business and issue property and casualty insurance in the state of  
 25 Washington.

1           2.3     On information and belief, defendant American Home Assurance Company  
2     ("American Home") is a New York insurance company that, at all times relevant to this action, did  
3     transact business and issue property and casualty insurance in the state of Washington.

4           2.4     On information and belief, defendant American Insurance Company ("American  
5     Insurance") is an Ohio insurance company that, at all times relevant to this action, did transact  
6     business and issue property and casualty insurance in the state of Washington.

7           2.5     On information and belief, defendant Federal Insurance Company ("Federal  
8     Insurance") is an Indiana insurance company that, at all times relevant to this action, did transact  
9     business and issue property and casualty insurance in the state of Washington.

10          2.6     On information and belief, defendant Lexington Insurance Company ("Lexington")  
11     is a Delaware insurance company that, at all times relevant to this action, did transact business and  
12     issue property and casualty insurance in the state of Washington.

13          2.7     On information and belief, defendant Liberty Mutual Insurance Company ("Liberty  
14     Mutual") is a Massachusetts insurance company that, at all times relevant to this action, did transact  
15     business and issue property and casualty insurance in the state of Washington.

16          2.8     On information and belief, defendant Oakwood Insurance Company ("Oakwood") is  
17     a Tennessee insurance company and a successor in interest to Central National Insurance Company  
18     of Omaha, a former Nebraska insurance company, that, at all times relevant to this action, did  
19     transact business and issue property and casualty insurance in the state of Washington.

20          2.9     On information and belief, defendant OneBeacon Insurance Company  
21     ("OneBeacon") is a Pennsylvania insurance company and a successor in interest to Houston  
22     General Insurance Company, a former Texas insurance company, that, at all times relevant to this  
23     action, did transact business and issue property and casualty insurance in the state of Washington.

24          2.10    On information and belief, defendant TIG Insurance Company ("TIG") is a  
25     California insurance company and a successor in interest to International Insurance Company, a  
26     former Illinois insurance company, that, at all times relevant to this action, did transact business and  
27     issue property and casualty insurance in the state of Washington.

2.11 On information and belief, defendant Twin City Fire Insurance Company (“Twin City”) is an Indiana insurance company that, at all times relevant to this action, did transact business and issue property and casualty insurance in the state of Washington.

2.12 On information and belief, defendant United States Fidelity & Guaranty Company (“USF&G”) is a Connecticut insurance company that, at all times relevant to this action, did transact business and issue property and casualty insurance in the state of Washington.

2.13 On information and belief, defendant United States Fire Insurance Company (“U.S. Fire”) is a Delaware insurance company that, at all times relevant to this action, did transact business and issue property and casualty insurance in the state of Washington.

2.14 On information and belief, defendant Westchester Fire Insurance Company (“Westchester”) is a Pennsylvania insurance company and a successor in interest to International Insurance Company, a former Illinois insurance company, that, at all times relevant to this action, did transact business and issue property and casualty insurance in the state of Washington.

2.15 On information and belief, defendant Westport Insurance Corporation (“Westport”) is a Missouri insurance company and a successor in interest to Employers Reinsurance Company, a former Missouri corporation, that, at all times relevant to this action, did transact business and issue property and casualty insurance in the state of Washington.

### III. JURISDICTION AND VENUE

3.1 This Court has jurisdiction over the subject matter of this action pursuant to RCW 2.08.010 and RCW 7.24.010, and because the Site giving rise to the underlying liabilities is located within the state of Washington, and the alleged occurrences occurred within the state of Washington.

3.2 This Court has jurisdiction over each of the named defendant Insurers because, on information and belief, each defendant Insurer is licensed and authorized to do business in the state of Washington; has, within the relevant time periods, transacted the business of selling insurance in the state of Washington; and has issued liability insurance policies to Ash Grove which cover risks located in the state of Washington.

1           3.3     Venue is proper in King County pursuant to RCW 4.12.025 because one or more of  
2     the defendants conducts business in King County, the events and property giving rise to the dispute  
3     occurred in or are located in King County, and the majority of the operative facts that underlie Ash  
4     Grove's claims arose in King County.

5                                   **IV.   FACTUAL BACKGROUND**

6           4.1     Ash Grove realleges and incorporates by reference all preceding paragraphs as if  
7     fully set forth herein.

8           **A.     Lower Duwamish Waterway Superfund Site (the "Site")**

9           4.2     The Site is an approximate 5-mile stretch of the Duwamish River that flows into  
10    Elliott Bay and the Puget Sound in Seattle, King County, Washington. The Site includes the  
11    waterway and upland sources of contamination to the waterway. The Lower Duwamish Waterway  
12    ("LDW") and adjacent upland areas have served as Seattle's major industrial corridor since the  
13    LDW was created by widening and straightening much of the Duwamish River in the early 1900s,  
14    and industrial activities have been in existence along and in connection with the waterway  
15    continuously since the early 1900s.

16          4.3     On information and belief, and as alleged by the United States Environmental  
17    Protection Agency ("EPA"), historic industrial use of hazardous substances, and/or various spills  
18    and other accidents involving such hazardous substances, along the waterway have resulted in the  
19    release of hazardous substances into the environment and have left the waterway and sediments  
20    contaminated with hazardous substances and toxic chemicals, resulting in pollution and property  
21    damage.

22          4.4     In 2001, the EPA listed the Site on EPA's National Priorities List. In 2002, the State  
23    of Washington Department of Ecology ("Ecology") added the Site to the Washington Hazardous  
24    Sites List in 2002. On information and belief, hazardous substances associated with and released in  
25    the course of historical industrial operations, and/or involved in various spills and other accidents  
26    along the waterway, have led to pollution and resulting property damage in the waterway sediments  
27    that include, but are not necessarily limited to, polychlorinated biphenyls (PCBs), dioxins/furans,

1 polycyclic aromatic hydrocarbons (“PAHs”), mercury and other metals, arsenic, and other  
2 contaminants.

3       4.5     On information and belief, and as alleged by EPA, hazardous substances associated  
4 with and released in the course of historical industrial operations, and/or involved in various spills  
5 and other accidents along the waterway, entered the LDW through a variety of pathways, including  
6 discharge through pipes, surface water or groundwater; discharge of materials directly into the  
7 waterway; or soil erosion. On information and belief, these spills and releases have occurred  
8 throughout the industrial use of the waterway, specifically including during the terms of the  
9 Policies, as defined below, at issue in this action. On information and belief, since the  
10 industrialization of the LDW in the early 1900s, hazardous substances are alleged to have been  
11 released to the LDW and to have contributed to the Site contamination and resulting property  
12 damage.

13       4.6     EPA and Ecology have divided lead-agency responsibility for addressing  
14 contamination at the Site, with EPA taking lead agency status for the in-waterway portion of the  
15 Site and Ecology taking lead agency status for upland source control.

16       4.7     In or around 2007, EPA notified over 100 companies, including Ash Grove, of their  
17 status as a potentially responsible party (“PRP”) under CERCLA for Site liability.

18       4.8     On information and belief, four PRPs—the City of Seattle, King County, the Port of  
19 Seattle, and the Boeing Company (collectively the “Lower Duwamish Waterway Group” or  
20 “LDWG”) have performed a number of “early action” sediment cleanups in several of the most  
21 contaminated sections of the river. On information and belief, the LDWG PRPs collectively have  
22 spent in excess of \$100 million for investigation, planning, and early-action cleanup, portions of  
23 which they will seek to recover from other PRPs.

24       4.9     In or around 2013, the LDWG parties invited many of these PRPs to participate in  
25 developing and participating in an alternate dispute resolution (“ADR”) process to allocate  
26 responsibility for LDW Site liability. Ash Grove is participating in and defending itself in the ADR  
27 process. Dozens of public and private entities representing historic or current owners or operators  
28

1 of facilities along the waterway in Seattle, Washington, and with a nexus to the LDW are  
2 participating in the ADR process.

3 4.10 In 2014, EPA issued the final LDW Site Record of Decision ("ROD") documenting  
4 the approved Site-wide sediment cleanup approach. On information and belief, EPA is continuing  
5 to conduct sampling and remedial design work intended to inform and guide Site-wide cleanup.  
6 EPA's ROD estimates the Site-wide cleanup will cost \$343 million.

7 4.11 Pursuant to the ROD, the site-wide cleanup will involve the dredging of  
8 contaminated sediments from much of the river, the capping of less contaminated areas, and the  
9 enhancement of natural sediment recovery by adding a carbon substrate to certain cap materials.

10 4.12 In addition to the Site-wide cleanup, Natural Resource Damage ("NRD") Trustees  
11 for the LDW Site have alleged that the historic disposal and release of hazardous substances at the  
12 site have contributed to damages or injury to, destruction of, or loss of natural resources at the Site,  
13 including the benthic community, flatfish, and salmon, particularly Chinook salmon and steelhead,  
14 which are listed as threatened under the Endangered Species Act.

15 4.13 NRD Trustees for the LDW include the State of Washington, including Ecology (as  
16 lead state trustee), Fish and Wildlife, and Natural Resources; the National Oceanic and  
17 Atmospheric Administration of the U.S. Department of Commerce; and the U.S. Department of the  
18 Interior, which includes the Fish and Wildlife Service and the Bureau of Indian Affairs, the  
19 Muckleshoot Indian Tribe, and the Suquamish Tribe.

20 **B. Ash Grove Property Ownership and Operations**

21 4.14 Ash Grove is a family-owned company that manufactures portland cement,  
22 operating in eight plants throughout the country, including in the state of Washington.

23 4.15 Ash Grove has owned, leased, and/or operated at facilities within the boundaries of  
24 the LDW Site, in Seattle, Washington, and specifically at the following locations:

25 a. From 1984 to present, Ash Grove, itself or through a wholly-owned  
26 subsidiary, has owned and/or operated a portland cement manufacturing and processing plant and  
27 associated terminal at real property located at 3801 East Marginal Way S., Seattle, Washington, and  
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1 within the boundaries of the LDW Site (the "Seattle Plant"). Ash Grove employs approximately 80  
2 people in conjunction with its operations at the Seattle Plant, and the day-to-day operations are  
3 managed locally by a Plant Manager. The Seattle Plant is located on the east side of the LDW at  
4 River Mile 0.0 to 0.1. For purposes of this Complaint, the "Site" includes, but is not limited to, the  
5 Seattle Plant.

6           b. From 1987 to 1991, Ash Grove, itself or through a wholly-owned subsidiary,  
7 leased and/or operated a cement import and distribution terminal located on a 6.53-acre parcel of  
8 real property located at 5900 West Marginal Way S., Seattle, Washington, and within the  
9 boundaries of the LDW Site (the "West Terminal"). During its operations, Ash Grove employed up  
10 to approximately ten people in conjunction with its former operations at the West Terminal, and the  
11 day-to-day operations were managed locally by a Terminal Manager and overseen by the Plant  
12 Manager at Ash Grove's Seattle Plant facility. The West Terminal was located on the west side of  
13 the LDW at River Mile 1.4 to 1.5. For purposes of this Complaint, the "Site" includes, but is not  
14 limited to, the West Terminal.

15           4.16 On information and belief, cement manufacturing and processing have been  
16 conducted at the Seattle Plant property and facilities for over 85 years, and continuously since in or  
17 around 1928, specifically including during the terms of the Policies, as defined below, at issue in  
18 this action. On information and belief, former owners of and operators at the Seattle Plant property  
19 used hazardous substances in connection with operations at the plant. During this operational  
20 history, hazardous substances are alleged to have been released at and from the Seattle Plant subject  
21 property and to have contributed to the Site contamination and resulting property damage.

22           4.17 On information and belief, industrial activities have been conducted at the West  
23 Terminal property and facilities for over 80 years, and continuously since in or around 1930,  
24 specifically including during the terms of the Policies, as defined below, at issue in this action. On  
25 information and belief, former owners of and operators at the West Terminal property used  
26 hazardous substances for use in connection with operations at the subject property, including, but  
27 not necessarily limited to, activated charcoal and wheylerite production, chemical production,  
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1 including the production of resins for the plywood industry, as well as adhesives, glues, wood  
2 preservatives (pentachlorophenol), plastic polymers, and other chemicals, and bulk cement import  
3 and distribution. During this operational history, hazardous substances are alleged to have been  
4 released at and from the West Terminal subject property and to have contributed to the Site  
5 contamination and resulting property damage.

6 4.18 In 2007, EPA identified Ash Grove as a PRP with respect to the Site and provided  
7 Ash Grove with a general notice letter of potential liability alleging Ash Grove to be a PRP under  
8 CERCLA based on Ash Grove's ownership and the historic activities associated with the Site. In  
9 2012, EPA provided Ash Grove with a second general notice letter confirming its PRP status with  
10 respect to the Site and its potential liability under CERCLA for the cleanup of the Site or the costs  
11 EPA has incurred or will incur in cleanup of the Site.

12 4.19 In 2009, the NRD Trustees advised Ash Grove of their natural resource damage  
13 claim against Ash Grove under CERCLA for damages arising from injuries to, destruction of, or  
14 loss of publicly owned or managed natural resources resulting from the releases of hazardous  
15 substances at the Site, including the Trustees' costs in assessing those damages.

16 4.20 In 2013, the LDWG parties alleged that a portion of the total cleanup costs  
17 associated with the Site would be allocated to Ash Grove and invited Ash Grove, and other PRPs,  
18 to participate in an ADR allocation process to allocate responsibility for LDW liability. Ash Grove  
19 is defending itself in the ADR process.

20 4.21 Ash Grove has incurred and will incur damages, including defense and  
21 indemnification costs for, among other things, the environmental cleanup of the Site and resulting  
22 property damage; for natural resource damages; and for and in responding to the allegations by  
23 EPA, Ecology, the NRD Trustees, and/or by other PRPs arising out of and related to the LDW Site,  
24 including, but not limited to, the Seattle Plant and the West Terminal.

1           **C.     Insurance Policies**

2           4.22    The Insurers and/or their predecessors in interests sold primary, umbrella, and/or  
3   excess liability insurance policies (collectively, the “Policies”) that provide insurance coverage to  
4   Ash Grove.

5           4.23    On information and belief, the Insurers sold and issued to Ash Grove those Policies  
6   identified on the attached Exhibit A, which insurance policies provide defense and indemnification  
7   coverage for Ash Grove’s alleged liabilities for environmental contamination and hazardous waste  
8   at the Site, which includes, without limitation, liabilities and losses associated with property  
9   damage caused by an accident or occurrence.

10          4.24    On information and belief, the Insurers may have issued additional policies of  
11   insurance to Ash Grove that have not yet been discovered, but may be discovered in the course of  
12   discovery, which insurance policies provide defense and indemnification coverage for Ash Grove’s  
13   alleged liabilities for environmental contamination and hazardous waste at the Site, which includes,  
14   without limitation, liabilities and losses associated with property damage caused by an accident or  
15   occurrence.

16          4.25    On information and belief, the Insurers were and are licensed in the state of  
17   Washington and authorized to issue property and casualty insurance covering risks in the state of  
18   Washington.

19          4.26    The Policies provide, without limitation, coverage for liabilities arising from  
20   accidents or occurrences that occurred during the Policies’ respective term(s) and effective  
21   period(s).

22          4.27    EPA, Ecology, the NRD Trustees, and/or other PRPs associated with the Site have  
23   alleged Ash Grove to be liable for damages, including property damage, within the meanings of the  
24   Policies.

25          4.28    Property damage and occurrences within the meanings of the Policies have occurred  
26   or are alleged to have occurred at the Seattle Plant, the West Terminal, and/or otherwise at and  
27  
28

1 associated with the Site in Seattle, Washington, and which give rise to Ash Grove's alleged  
2 liabilities.

3 4.29 EPA, Ecology, the NRD Trustees, and/or other PRPs associated with the Site have  
4 alleged Ash Grove to be liable for damages, including property damage, resulting from accidents or  
5 occurrences at the Site generally, and not attributable to and which may pre-date and/or post-date  
6 Ash Grove's operations.

7 4.30 Ash Grove has given the Insurers notice of the claims against Ash Grove, and of its  
8 alleged liabilities at and associated with the LDW Site.

9 4.31 Ash Grove has complied with or will comply with all conditions precedent in the  
10 Policies.

11 4.32 Each Insurer is obligated under the terms of its insurance policies to defend or pay or  
12 contribute to the cost of defense of such claims and actions, and for such future claims and actions,  
13 brought by third parties, including, but not limited to, EPA, Ecology, the NRD Trustees, and/or  
14 other PRPs, and to pay all losses and/or all sums that Ash Grove becomes legally obligated to pay  
15 as a result of such claims and actions.

16 4.33 Defendant USF&G has agreed to and is contributing to Ash Grove's costs of defense  
17 of potential Site liabilities under a reservation of rights under two policies issued to Ash Grove:  
18 Policy Number 1CC025144845, effective from January 1, 1984 to January 1, 1985; and Policy  
19 Number 1CC047821004, effective from January 1, 1985 to January 1, 1986 (collectively, the "1984  
20 and 1985 USF&G Policies").

21 **V. CAUSE OF ACTION: DECLARATORY JUDGMENT**

22 5.1 Ash Grove realleges and incorporates by reference all preceding paragraphs as if  
23 fully set forth herein.

24 5.2 The Insurers have failed to recognize and provide all coverage to which Ash Grove  
25 is entitled under each of their respective policies in connection with the Site.

26 5.3 Pursuant to chapter 7.24 RCW, Ash Grove is entitled to a declaratory judgment as to  
27 the rights, duties, and obligations of the parties under the Policies in connection with the Site.

1           5.4     Specifically, Ash Grove is entitled to a declaratory judgment that (1) where provided  
 2     under the terms of the Policies (except for the 1984 and 1985 USF&G Policies, under which  
 3     USF&G has already agreed to and is contributing to Ash Grove's costs of defense of potential Site  
 4     liabilities under a reservation of rights), the Insurers have an obligation to defend or pay full  
 5     defense costs in connection with the underlying claims, demands, suits, and/or proceedings against  
 6     Ash Grove arising out of the Site; (2) the Insurers have an obligation under each of their respective  
 7     policies to indemnify Ash Grove for its losses and liabilities, including cleanup costs and other  
 8     damages, associated with the Site; and (3) the Insurers have an obligation under each of their  
 9     respective policies to provide Ash Grove all other coverage to which Ash Grove is entitled in  
 10    connection with the Site.

11           5.5     An actual and justiciable controversy within the jurisdiction of the Court exists  
 12    between Ash Grove and the Insurers as to the rights, duties, and obligations of the parties under the  
 13    Policies (except with respect to USF&G's defense obligations under the 1984 and 1985 USF&G  
 14    Policies, under which USF&G has already agreed to and is contributing to Ash Grove's costs of  
 15    defense of potential Site liabilities under a reservation of rights) concerning the Site.

16           5.6     A judicial declaration is necessary and appropriate at this time so that Ash Grove  
 17    may ascertain the defense, indemnity, and other obligations of the Insurers in connection with Site.

#### 18                               **VI.    PRAYER FOR RELIEF**

19           WHEREFORE, having stated the above causes of action, plaintiff Ash Grove Cement  
 20    Company prays for judgment in its favor as follows:

21           A.     For declaratory relief against each of the Insurers, declaring that (1) where provided  
 22    under the terms of the Policies (except for the 1984 and 1985 USF&G Policies, under which  
 23    USF&G has already agreed to and is contributing to Ash Grove's costs of defense of potential Site  
 24    liabilities under a reservation of rights), the Insurers have an obligation to defend or pay full  
 25    defense costs in connection with the underlying claims, demands, suits, and/or proceedings against  
 26    Ash Grove arising out of the Site; (2) the Insurers have an obligation under each of their respective  
 27    policies to indemnify Ash Grove for its losses and liabilities, including cleanup costs and other  
 28

1 damages, associated with the Site; and (3) the Insurers have an obligation under each of their  
2 respective policies to provide Ash Grove all other coverage to which Ash Grove is entitled in  
3 connection with the Site.

4 B. For entry of judgment in favor of Ash Grove for the amount of all costs incurred by  
5 Ash Grove in this action, including reasonable attorneys' fees and costs pursuant to RCW 7.24.100;  
6 *Olympic Steamship Company v. Centennial Insurance Company*, 117 Wn.2d 37 (1991); or as may  
7 otherwise be allowable pursuant to law or equity; and

8 C. For such other and further relief as the Court deems just and equitable.

9 Dated: May 8, 2015.

10 s/Stephen J. Tan

11 WSBA No. 22756

12 Joseph A. Rehberger, WSBA No. 35556

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